ORDER OF DISTRICT JUDGE DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

TINY SMITH,	) Civil Action
	) No. 79-965-1
Plaintiff,	)
	) ORDER
vs.	)
	)
SOUTHERN RAILWAY COMPANY,	)
	)
Defendant.	)
	)

This matter came before me for hearing on December 11, 1980, on motion of defendant for judgment notwithstanding the verdict (n.o.v.) and, failing in this, for a new trial on fifty-seven (57) grounds as set forth in the motion. Supplemental motions, including eight (8) additional grounds for a new trial, were filed out of time. Nevertheless, all of the grounds have been considered in reaching a decision.

The complaint as initially filed set forth five causes of action: two for malicious prosecution, two for malicious abuse of process, and one for tortious interference with a contractual relationship between plaintiff and his employer.

The causes of action for malicious abuse of process were eliminated when this court granted defendant's motion for summary judgment. The case thereupon came on for trial before this court and a jury at Charleston, South Carolina. Jury verdicts were rendered in favor of plaintiff for actual damages in the sum of Two Hundred Sixty-Three Thousand and No/100ths ($263,000.00) Dollars and punitive damages in the sum of Two Hundred Forty-Eight Thousand and No/100ths ($248,000.00) Dollars on the first cause of action, actual

damages in the sum of Two Hundred Nineteen Thousand and No/100ths ($219,000.00) Dollars and punitive damages in the sum of Two Hundred Seventy-Nine Thousand and No/100ths ($279,000.00) Dollars on the second cause of action, and actual damages in the sum of Eight Thousand One Hundred Fifty and No/100ths ($8, 150.00) Dollars and punitive damages in the sum of Three Hundred Thirty-Nine Thousand and No/100ths ($339,000.00) Dollars on the third cause of action.

This court has carefully reviewed the grounds urged by defendant in support of its motions and has given due consideration to the briefs and able arguments of counsel for the respective parties.

The motion for judgment n.o.v. is denied. The evidence was sufficient to

withstand defendant's motion for directed verdicts as to all causes of action. The testimony adduced at trial and the reasonable inference therefrom, although conflicting in some areas, presented questions of fact properly determinable by a jury. This clearly appears in light of the following evidence of record: defendant's threat of a jail sentence against plaintiff for refusing to sign a statement containing facts of which plaintiff had no knowledge or information; the instigation by defendant's officers of two successive crimination prosecutions against plaintiff; the subsequent indictment, trials and acquittals; the information laid by defendant's officers before the United States Postal Inspector and the Assistant United States Attorney used

as the basis for commencing and proceeding with the criminal prosecutions; the billing practices of defendant requiring independent contractors, including plaintiff, to invoice for work performed at specific sites to the budget accounts of the defendant set aside for the payment of work at different other sites; the billing practices of defendant relating to the purchases of supplies whereby suppliers were required to submit invoices only to company-designated vendors, of which plaintiff was one, who in turn paid the invoices themselves, prepared their own invoices and then sent them to the defendant for payment without having any other contact with the supplier or personal knowledge of whether the supplies were delivered to the defendant company;

the conduct of defendant's officers, when laying the information before the Postal Inspector and Assistant United States Attorney for prosecution, in withholding and failing to make a full, fair, accurate and complete disclosure of material exculpatory facts, particularly concerning the billing practices of defendant; the mutually satisfactory contractual relationship between plaintiff and his employer; the interference by defendant's agent with plaintiff's employment, and the termination of such employment by reason of such interference, together with the other evidence of record. These were all facts and circumstances which presented factual questions as to each cause of action which were properly submitted to the jury for its determination.

The motion for a new trial is also denied. Defendant's motion sets forth sixty-five (65) grounds. Discussion of all of the grounds is not warranted, and the court gives its attention at this time only to those grounds hereinafter treated.

Defendant complains in ground numbered 34 of its motion that this court interfered in causing The Honorable Robert F. Chapman, Judge of the District Court for South Carolina, Columbia Division, to revoke his order of October 14 or 15, 1980, issued pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. This is an erroneous assumption upon the part of counsel for defendant.

The facts in connection with this are as follows. During these proceedings, this court denied the defendant's motion

to permit a United States Postal Inspector and an Assistant United States Attorney to testify concerning matters which had come before the Grand Jury in the related criminal proceedings; advising the defendant at that time of exactly what evidence presented to the Grand Jury it would permit to be introduced in the instant case. Later in the trial, this court was advised by John Gregg McMaster, Esq., one of the attorneys for the defendant, that he had obtained the order pursuant to Rule 6(e), Federal Rules of Criminal Procedure, from Judge Chapman, releasing the Grand Jury exhibits. Mr. McMaster stated that he had obtained the order based on an affidavit he had dictated via telephone to Columbia. Upon being questioned by this court, he advised that he had not

informed Judge Chapman of this court's previous denial of his application for a Rule 6(e) order. A brief recess was called; but, immediately after it reonvened, the court was informed that Judge Chapman was seeking to communicate with it via telephone, and another recess was called. It was during this time that this court was advised by Judge Chapman that he had signed the Rule 6(e) order upon the representation made to him by defense counsel that this court's refusal to issue such an order was predicated upon its opinion that it had no authority to issue the order; that only Judge Chapman, as the judge who had presided over the Grand Jury, had such authority. When Judge Chapman was advised that this was not the reason for this court's refusal to issue

a Rule 6(e) order, he advised that his order would be revoked. The trial of this case was then resumed and all counsel were notified of the revocation by Judge Chapman of the Rule 6(e) order. At no time during this period did this court precipitate contact with Judge Chapman concerning this matter.

Ground numbered 19 of defendant's motion complains of an error on the part of the court in instructing the jury to disregard all testimony concerning "back up sheets". This instruction was given as the imposition of a sanction under Rule 37 of the Federal Rules of Criminal Procedure because of defendant's violation of pre-trial discovery orders directed to the parties to produce and furnish to each other all relevant documents for

inspection and copying. In violation of such orders, defendant did not produce or furnish to plaintiff or his attorneys "back up sheets" in its possession which contained supporting data for the invoices received by defendant from plaintiff. Notwithstanding, defendant's attorneys undertook to and did vigorously cross-examine plaintiff's witnesses about their inability to produce copies of the "back up sheets" which were required by defendant to accompany plaintiff's invoices. However, during the presentation of defendant's case, it was inadvertently discovered that the "back up sheets" supporting plaintiff's invoices were at all times during cross-examination of the plaintiff's witnesses in the possession of defendant. Being of the opinion that

the cross-examination could have led the jury to believe that the failure of the plaintiff to produce copies of "back up sheets" was part of a scheme to defraud, the court, in the interest of justice and as a sanction, instructed the jury to disregard all testimony in connection therewith.

Defendant also complains that the verdicts of the jury are the result of passion, prejudice and caprice by reason of the large amount of damages awarded to plaintiff. The amount of damages, although large, is neither excessive nor the result of passions, prejudice or caprice, and is not without support in the record. This is made clear when the following evidence of record is considered: the plaintiff's pecuniary loss; the

humiliation, embarrassment and loss of reputation suffered by plaintiff; the wealth of defendant, and the flagrant willful conduct of defendant in threatening plaintiff with a jail sentence, then instigating two criminal prosecutions against plaintiff without making a full and fair disclosure of exculpatory material facts to the prosecuting authorities and, finally, tortiously interfering with plaintiff's contractual relations. The humiliation, embarrassment, distress and damage to reputation suffered by plaintiff as the result of the tortious acts of defendant are incapable of exact measurement. The amount of an award depends upon the facts of each case and is to be determined by the jury in the exercise of sound judgment and from

its common experience. This the jurors, all of whom appeared to be intelligent and most attentive throughout this long trial, did in the instant case, and no valid reason has been advanced why a new trial should be granted. It is, therefore,

ORDERED, that the motion of defendant for judgment notwithstanding the verdict (n.o.v.) and its alternative motion for a new trial be, and the same are hereby, denied.

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
FALCON B. HAWKINS
United States District Judge

Charleston, South Carolina.

February 11th, 1981.

DECISION OF COURT OF APPEALS
FOR FOURTH CIRCUIT
REVERSING JUDGMENT OF THE
DISTRICT COURT

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

NO. 81-1260

TINY SMITH Appellee

v.

SOUTHERN RAILWAY COMPANY Appellant

Appeal from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, District Judge.

Argued November 2, 1981 Decided September 20, 1982

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

Ronald D. Hodges (Wharton, Aldhizer & Weaver on brief); John Gregg McMaster (Tompkins, McMaster & Thomas; Ben Scott Whaley, Barnwell, Whaley, Stevenson &

Patterson, on brief) for Appellant; Henry B. Hammer, O. Grady Query (John K. Grisso, Philip A. Middleton, on brief) for Appellee.

WIDENER, Circuit Judge:

Southern Railway Company (Southern) appeals from judgment on a jury verdict for actual and punitive damages on two claims of malicious prosecution and one of tortious interference with contract. Because we are of opinion that the evidence does not warrant a recovery, we reverse.

For a number of years, Tiny Smith worked as a contractor for Southern Railway. He and his crew and machines were primarily engaged on the sites of derailments and doing other maintenance and construction work. He also had a contract to maintain the dump at Southern's yards in Columbia, South Carolina, for which he was paid $2000 per month.

About 1976, Southern Railway police discovered frauds of large proportions

perpetrated by railway employees and contractors upon Southern. In the most general terms, some Southern employees had been receiving and approving false invoices, including invoices through a fictitious company. The railway police informed Postal Inspector Kay of their discoveries, and he continued the investigation with their assistance.

One aspect of the investigation eventually centered on Tiny Smith. The railway police discovered an invoice for a five-ton air conditioner billed by Smith to Southern, but no such air conditioner could be found on railway property. The investigation showed that a four-horsepower heating and air conditioning unit (the same device as that billed as the five-ton unit) had been installed in the home of one Ridgill, a supplier to the

railway, and the company that installed it had sent the bill to Smith. At the request of one Edwards, a master mechanic for the railway, Smith had paid the bill to the supplier and submitted to Southern an invoice for the amount of the bill, plus a ten percent handling charge, which was paid on approval by Edwards. Smith was acquitted of mail fraud in connection with this transction, but Edwards was convicted, as was the recipient of the air conditioner. This was the subject of Smith's first cause of action.

The investigation further revealed 21 invoices that Smith had submitted for work allegedly done on derailments. Railway employees who were at the sites of the derailments in question informed investigators that Smith was not there. Smith was acquitted of mail fraud in connection with

16 of those invoices with which he was charged. The same master mechanic, Edwards, who approved the 16 invoices for payment, was also acquitted. This was the subject of Smith's second cause of action.

In December 1978, following his criminal trials, Smith undertook, for Brason Construction Company, to operate his front-end loader on a job Brason was doing for Southern Railway. Brason agreed to move Smith's machine to the job site and to pay Smith $30 per hour for his services and the use of his machine. Smith worked for Brason for about two months. At the end of February 1979, A Southern employee learned that Smith was working for Brason and immediately asked Brason to remove Smith from Southern property. Brason did so. This is the subject of Smith's third cause of action.

On September 27, 1976, Postal Inspector Kay and three railway police officers interviewed Smith. Smith explained that he had been asked to handle the billing for the air conditioning unit by Edwards, who told Smith the unit was for the railway, and that he (Smith) agreed to do so for a ten percent handling fee. The officers' and Smith's versions of this part of the interview are essentially the same.

Smith's explanation of what was said at the interview with respect to the derailment invoices, however, may be said to differ from that of the officers. The officers say that Smith stated that he was present at all of the derailments for which he submitted invoices, except that about one time in four he would have been called to the derailment but did not

arrive before the work was completed. In those latter situations, he would still submit a bill for his time. Smith, in his testimony, gave two different versions of the interview. One was essentially the same as that of the officers. The other was that he had been to few, if any, of the derailments in question but that he had performed the services billed on his derailment invoices working at Southern's trash dump.

Smith did tell the officers at the interview, taking his version of the conversation, that on one occasion some underpinning had been put under a trailer used by the railway police as an office which was billed as a derailment to the knowledge of the officer involved, one Shuman. Shuman (deceased at the time of the civil trial) testified (in the criminal case

and introduced here) that the invoice for the work had been given to Smith but that he didn't know how Smith had billed it to the railway. The invoice for this job was not one of the invoices which were the subject of Smith's indictment or the then current investigation. In all events, Postal Inspector Kay was fully aware of the contention concerning the underpinning at the time of the interview. Also, taking Smith's testimony concerning this interview at face value most favorable to him, Inspector Kay was also aware of his contention concerning the invoicing of the derailments in question at that time. No claim is made that the subject of any common practice of the railway to do work on one job and pay an invoice for another was mentioned at that meeting.

Smith initially filed a suit for

malicious prosecution in May 1978, but voluntarily dismissed the case. He then instituted his suit for malicious prosecution in May 1979, and added the claim for tortious interference with a contract. The case was tried to a jury, which returned a verdict for Smith in all counts, upon which judgment was entered.

In order to prevail in a suit for malicious prosecution, a plaintiff must show that the defendant maliciously instituted the earlier prosecution against the plaintiff, that no probable cause for prosecution existed, that the prosecution was terminated in favor of the plaintiff, and the plaintiff suffered injury. Prosser v. Parsons, 245 S.C. 493, 141 S.E. 2d 342 (1965). The present case turns to some extent on the existence of probable cause to instigate the prosecution of Tiny Smith.

Under South Carolina law, "(p)robable cause in this context does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." Kinton v. Mobile Home Industries, Inc., 274 S.C. 179, 181, 263 S.E. 2d 727, 728 (1980), following White, infra. A true bill of indictment by a grand jury is prima facie evidence of probable cause. Id. It ". . .amounts to a judicial recognition that probable cause does exist." White v. Coleman, 277 F.Supp. 202 (D.S.C. 1967).

To rebut the presumption of probable cause, Smith alleged that the railway police intentionally withheld information from Postal Inspector Kay and the Assistant

United States Attorney that would have affected the government's decision to prosecute, or its decision to proceed with the prosecution. Specifically, he claims that the railway officers failed to disclose that job swapping was a common practice of Southern. Job swapping is a term used by the parties here to indicate that services or material of one kind had been furnished to the railway, but had been billed to another railway job.

Smith can only prevail on his theory of willful misrepresentation if he established that job swapping was in fact a common practice, that the railway police knew of the practice, that they failed to disclose it, and that the government prosecutors would have had no probable cause to prosecute had they known of Southern's

claimed job swapping practices. The evidence presented at trial as to whether or not job swapping was a common practice was conflicting. Most of plaintiff's witnesses testified that it was not, but a few testified that it was. Several testified that it occurred from time to time, but was not a practice. The railway police officers who conducted the initial investigation, and who are charged with having failed to disclose the railway's billing practices, testified that, to their knowledge, job swapping was not a common practice. This testimony of the officers was essentially uncontradicted for the record does not disclose that they had any knowledge of such practice. It is true that the record does indicate that a few incidents of similar events may have come to their attention, but so far as a

company practice goes, the facts simply do not support the conclusion that the railway police knew of the practice, even if it in fact existed, prior to the indictment.

The first time there was a claim that the so-called job swapping was a common practice at Southern that would have involved Smith was in January 1977 at a conference attended at least by Ruschky, the Assistant United States Attorney in charge of the prosecution, Postal Inspector Kay, and the attorneys for Edwards, Ridgill, and Smith. Edwards was in the room and Smith was called into the room later. Also present were Russell of the railway police and the head of the railway police. The meeting was held in the office of one of the defendant's attorneys, and the purpose of the meeting was in order that

". . . the defendants had a defense they were going to tell us (the government) about." Parenthetically, Edwards, in an earlier interview with Inspector Kay, had blamed his difficulties on budgetary restrictions of the railway, and said that a company called Tyger Mill was established in order to obtain a "slush fund" to purchase items needed by Southern which could not be purchased due to budgetary restrictions. At one place in his testimony, Kay said that Edwards said it was a common practice. Tyger Mill, however, is the subject of another fraud on Southern and not directly in this case except that this interview may be the only time prior to the indictment that what is now called job swapping came to the attention of the government, for job swapping and budgetary problems are somewhat equated in the record.

Edwards similarly said at the January 1977 meeting that the false invoices for the air conditioner and derailments were explained by his problems with the budget. As a result of that meeting, Ruschky, the Assistant United States Attorney, asked Kay to do some more investigating, which Kay did and reported again to Ruschky on February 3, 1977. The report indicated that Edwards' claim of purchasing goods for Southern in the form of personal checks payable to cash was not verified by an examination of Edwards' checking account, and that a later claim by Edwards at the January 1977 meeting that he had not cashed checks but did borrow from his wife could not be verified.

Additionally, and of more than usual consequence, Ruschky and Kay, following the January 1977 meeting, interviewed one

Holbrook, the Southern master mechanic in the Macon territory (comparable in size to the territory in question) to see if there were the same type of budgetary problems Edwards claimed that he had, and if that employee handled them in the same way. They also interviewed Edwards' successor, one Mowry. Both of these Southern employees told Ruschky that job swapping was not a practice. The Macon employee told them that sometimes it was done for small amounts and would not total $500 a year. Edwards' successor told Ruschky that he had never used it. Ruschky thus determined to himself that the defense had no merit and also was not true. He proceeded with the prosecution.

It is apparent that there was probable cause in abundance to indict Smith, Edwards, and Ridgill.

The air conditioner was admittedly fraudulently obtained by Ridgill. Smith invoiced the air conditioner to the railway on his invoice although he had never seen the unit nor handled it. He was not in the air conditioning business. Southern had paid Smith from March 1975 through April 1976 a sum in excess of $428,000 for work allegedly performed by him. Between January 1975 and January 1976, Smith had paid Edwards, the Southern master mechanic, the sum of $5200 by checks. Smith explained the five items making up that amount as loans, the last of which was in the amount of $3000.

With respect to the derailment invoices, the government had on hand 21 derailment invoices paid by six checks. With respect to each invoice, at least one responsible railway employee would

testify that none of Smith's men or equipment was used in correcting the derailment. On some of those items, indeed, other contractors or companies had performed the work, while on the balance Southern personnel had done so, sometimes assisted by others, but not Smith. An example is derailment No. R-7150 at Winnsboro, South Carolina, which was rerailed by Southern personnel in five minutes and for which Smith submitted an invoice for $300. Another is derailment No. R-6494 at Nixon, Georgia, on Continental Can Company property, which was rerailed by Continental Can personnel and equipment. Smith submitted an invoice on account of this derailment in the amount of $400. Details concerning each of the other invoices are of like import.

The same railway employee, Edwards,

approved for payment not only the invoice for the air conditioner but also each of the derailment invoices which Smith was accused of submitting falsely. So probable cause abounded.

There was never any claim in this proceeding that there was any practice, common or otherwise, or any incident, approved directly or by implication, that Southern employees, with either the consent or the acquiescence of the railway, had approved for payment invoices for material furnished or work done for which the railway got no benefit. Thus, even if there was a common practice of job swapping, it did not extend to installing air conditioners in the houses of people such as Ridgill. It is apparent that, there being probable cause for this indictment, and no defense of job swapping

available, that this cause of action must fail. The only defense shown by the record which Smith could have had to that offense was that of lack of knowledge that he was engaged in the fraudulent scheme. The government and the railway detectives were certainly justified by the knowledge they had at hand in going on with the prosecution, especially in view of the payments from Smith to Edwards in the amounts of $500, $500, $500, $700, and $3,000, which Smith claimed were loans.

The cause of action for malicious interference with a contract must also fail. In Southern's contract with Brason, Southern had the right to approve any subcontract. The district court treated Smith as an employee of Brason as a matter of law, although the matter we think was at the least more properly one for factual

consideration by the jury in view of certain parts of Smith's testimony. Smith testified that he was an "independent contractor." He did business on that job, he said, as Tiny Smith Excavating Company; he was paid by Brason, it is true, at an hourly rate for the work of himself and his machinery, but upon his invoice as Tiny Smith Excavating Company, not upon kept time. Smith had no fixed hours of work that the record shows, nor does it show that his manner of working was supervised nor that he received overtime pay. Neither withholding nor Social Security taxes were withheld from his payments from Brason. There are few other facts concerning the terms and conditions of Smith's employment by Brason, and those we have recited compel the conclusion that whether he was an independent

subcontractor or a mere employee was at least a matter for the jury if there was any question about it at all. If Smith was in fact an independent subcontractor, he would have been subject to removal under Southern's contract with Brason, for Southern had the right to approve any subcontractor. Thus, Smith's removal as an independent contractor from the job by Brason at the instance of Southern was nothing more nor less than the exercise by Southern of its rights under the contract for which it had to give no reason. Assuming, however, that Smith was an employee, we do not believe, in view of all that Southern knew about Smith's extensive activities with Edwards who had been convicted for defrauding the railway, that the law required Southern to permit Smith to work on its property.

Southern certainly had just cause not to do so regardless of Smith's acquittal, especially in the absence of evidence of any specific malice toward Smith, and none such appears in the record. The evidence is uncontradicted, and indeed not questioned, that Smith had been placed on a list of suppliers who were not approved to do business with Southern, which seems to us to be sufficient justification for Southern's requiring Brason to remove Smith from its property. As just noted above, Southern had every cause to place Smith on such a list.

Although the cause of action on account of the false invoices for the derailments is more complicated than the other two, we are of opinion that it also must fail. There is no doubt, as noted, that the government and the railway police

had at hand detailed information and witnesses that Smith had done none of the work in rerailing the trains in the 21 derailments under discussion in the case at that time. While Smith was indicted for only 16 of the 21, that does not alter the fact that the information was at hand, and the evidence is uncontradicted that Ruschky believed the 16 to be the best examples so he proceeded with them. Each of the invoices was approved by Edwards, who had approved the false invoice for the air conditioner. Edwards, but not Smith, was additionally involved in the Tyger Mill affair previously mentioned. Smith also had made payments of $6600 to one McCormick, a Southern bridge and building supervisor, who was also charged with a scheme to defraud the railway. Smith claimed these payments were for services

rendered by McCormick.

Nothing the railway detectives knew at the time of the indictment indicated a defense of a common practice of the railway to engage in job swapping, although they may have known of isolated incidents, must less that they maliciously withheld it from the government authorities. It is true that the defense was brought to the attention of the railway as well as the government authorities following the indictment. But the action of the government authorities with the cooperation of the railway following the indictment in investigating Edwards' successor and another master mechanic similarly situated could only have been in a good faith attempt to learn if the defense was of such considerable merit that the prosecution ought not to have been proceeded with.

The government's conclusion from that investigation that the prosecution should proceed was entirely justified and the testimony of Ruschky was uncontradicted that it was not urged upon him by the railway. Thus, taking the evidence in the light most favorable to Smith, and resolving all conflicts in his favor, we are of opinion there is no substantial evidence in the record to support the contention that the railway police maliciously withheld from the federal prosecuting authorities their knowledge of any meritorious defense Smith may have had to the indictment either before it was found or later. E.g. Hawkins v. Sims, 137 F2d 66 (4th Cir. 1943); Sparrow v. Yellow Cab, 273 F2d 1 (7th Cir. 1960). While it is understandable that a petit jury, especially giving Smith the benefit of the doubt, could find

him not guilty of knowingly participating in the submission of the false invoices in question, that is not to say that probable cause did not exist either for obtaining the indictment or for its prosecution.

The railway has raised numerous other assignments of error which, because of our disposition of the case, we need not consider.[1]

The judgment of the district court is accordingly

REVERSED.

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1. Some of the most relevant evidence in the case with respect to whether or not there was probable cause and whether the railway police made a full and fair disclosure to the postal inspector was apparently excluded by the district court. Much of this same evidence was admissible with respect to motive in the cause for interfering with the contract. We say apparently, to give an example, because the index indicates that evidence consisting of the postal inspector's reports

to the Assistant United States Attorney and a report by the railway detectives to the postal inspector were admitted into evidence, but that they were not for jury consideration. Later on, however, the court may have indicated that the parts of the exhibits referring to Tiny Smith were admissible. Our mention of certain derailment invoices by number comes from those lists (they were referred to in general in admitted testimony), as does our mention of the exact amount of payments to McCormick. The court permitted the examination of Smith with respect to the McCormick payments; indeed, this was on direct examination, so we take it that the documentary evidence with respect to them was also held to be admissible; as also the reference to the earlier statement of Edwards to which Smith's claim of job swapping is tied. We have tried to confine ourselves to referring to evidence admitted for jury consideration under the rulings of the district court, although it is quite permissible for us to consider evidence improperly excluded. F. H. McGraw & Co. v. Melcor Steel Co., 140 F2d 301 (2d Cir. 1945).

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
DOCKET NO. 81-1260

TINY SMITH, Appellee,

vs.

SOUTHERN RAILWAY COMPANY, Appellant.

PETITION FOR REHEARING

Appellee, Tiny Smith, respectfully prays that this Court grant a rehearing of its decision of September 20, 1982, reversing the judgment and in effect directing judgment for the Defendant. In counsel's judgment, rehearing is warranted for the following reasons:

I

The decision of this Court, reversing the judgment of the District Court and in effect directing a verdict for the

Defendant, was obviously based upon the ground that "the facts simply do not support the conclusion that the railway police knew of the practice" by Southern of job swapping and billing.

In overuling Judge Hawkins' denial of Defendant's motions for a directed verdict and judgment n.o.v., this Court apparently overlooked that it directed a verdict for the Defendant on a ground not specified in Defendant's motions for a directed verdict and judgment n.o.v., in violation of Rule 50(a) of the Federal Rules of Civil Procedure which requires that "a motion for a directed verdict shall state the specific grounds therefor."

Defendant's motion for a directed verdict and judgment n.o.v. stated as a specific ground therefor, not that the

railway police had no knowledge of Southern's claimed job-swapping practice and billing, but rather that the claimed practice of Southern's job-swapping and billing never existed (an issue as to which this Court stated in its opinion there was a conflict in the evidence) and therefore, "if such a practice were not a fact, there was no opportunity for the Defendant to disclose it to anyone." Paragraph D, Defendant's written motion for judgment n.o.v. and new trial; Reporter's Transcript, Page 1853, Line 24 through Page 1874, Line 6.

II

Assuming, arguendo, the ground which this Court relied upon for directing judgment in favor of the Defendant was specifically stated in Defendant's motion for

a directed verdict, it is respectfully submitted that this Court overlooked that such ground had no legal efficacy because a corporation cannot legally do indirectly that which it is probibited from doing directly, that is, a corporation instigating a criminal prosecution against a person when it, through its officers and agents had knowledge of facts and exculpatory of such person's guilt and withholds or fails to disclose such information to the prosecuting authorities, may be held liable for malicious prosecution and cannot exculpate itself from such liability by claiming that it instigated the criminal prosecution through other agents having no knowledge of the facts exculpatory to such person's guilt.

III

In reversing the ruling of the District Judge denying Defendant's motion for a directed verdict, this Court also overlooked the principle that a corporation can act only through its agents, servants and employees and thus, knowledge by any agent, servant and employee of a corporation while acting within the scope of his employment is imputed to the corporation, notwithstanding that other agents of such corporation may not possess such knowledge. See Crystal Ice Co. of Columbia vs. First Colonial, 273 S.C. 306, 257 S.E. 2d 496 (1979).

Thus, this Court apparently overlooked that the crucial issue in this case was not whether the railway police had knowledge of Southern's job-swapping

and billing practices, but whether Southern itself, by and through its superior officers and employees who initiated, encouraged and carried on the job-swapping and billing practices for the benefit of Southern had knowledge when the agents of Southern instigated the criminal prosecution against Plaintiff without disclosing the exculpatory information of Southern's job-swapping and billing practices.

IV

This Court, although recognizing in its opinion that in passing on Defendant's motion for directed verdict the evidence must be resolved in his favor, apparently overlooked the conflicts in the evidence required to be resolved in Plaintiff's favor, as appears by reference to the Reporter's Transcript of Record, Page

1853, Line 24 through Page 1874, Line 6, of the detailed consideration of the conflicting evidence of record and ruling on Defendant's motion for a directed verdict by District Judge Hawkins who had the opportunity to see and hear the witnesses and observe their demeanor from the witness stand, and his ruling on the motion for judgment n.o.v. and new trial. Appendix Pages 61 through 66. A copy of Reporter's Transcript of Record, Pages 1853 through 1874, and excerpt from Defendant's motion for judgment n.o.v. and new trial and Judge Hawkins' ruling thereon are submitted separately as Appendix A.

CONCLUSION

For the reasons set forth above, and in the briefs previously filed by the appellee, a rehearing should be granted

and upon rehearing the judgment in favor of plaintiff and against the defendant should be affirmed, or in the alternative, the cause should be remanded to the District Court for leave of the plaintiff/ appellee to move for a new trial.

Respectfully submitted,

/s/
HENRY HAMMER

/s/
O. GRADY QUERY

/s/
JOHN K. GRISSO

/s/
PHILIP A. MIDDLETON

Attorneys for Plaintiff/
Appellee

September 29, 1982.

CERTIFICATE OF COUNSEL

We, the undersigned counsel for Tiny Smith, Petitioner in the foregoing Petition, and Appellee in the above captioned Appeal, on whose behalf this Petition is filed, do hereby certify that the foregoing Petition for Rehearing is presented in good faith, upon what are considered reasonable grounds, and not for the purposes of delay.

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Charleston, S. C. 29401

APPENDIX TO PETITION FOR REHEARING

EXCERPTS FROM REPORTER'S TRANSCRIPT OF DEFENDANT'S MOTION FOR DIRECTED VERDICT, ARGUMENTS THEREON AND RULING OF DISTRICT JUDGE DENYING MOTION

Your Honor, the Defendant moves for a directed verdict or verdicts on several different grounds and in several different particulars. I'll start first with the cause of action for tortious interference with contractual relations. Incidentally, we are having this Motion typed up, and it, too, is on the way.

THE COURT: It should have been typing Saturday or some time, but go ahead.

MR. HENRY McMASTER: Yes, sir. That's right, sir.

As to the first cause of action as to the tortious interference with contractual relations, we believe that the only reasonable inference which can be drawn from the evidence is that the

Defendant was justified in interfering with the contract between Mr. Smith and Brason Construction Company, if such a contract existed. Basically, the grounds there or the reasons for the justification are this lengthy investigation that had been reported to Mr. Greenwood and Mr. Coggins that Tiny Smith was involved in inappropriate matters and he should be removed from the vendor list which he was. After that, of course, we have the two trials, and after that Tiny Smith brought the suit against the Southern Railroad. We submit that all of those things are plenty of justification for interfering with a contract, if there was a contract, in fact, on February the 27th, 1979.

The second thing about this interference, assuming that a contract existed, was that the only reasonable

inference that can be drawn from the evidence is that Southern Railroad did not act maliciously in interfering with that contract.

Now, there seems to be somewhat of a nebulous idea as to what constitutes maliciousness. The law in South Carolina is that in order to constitute tortious interference with a contract, it must be malicious. We submit to Your Honor that under the facts presented, under all the evidence, the only reasonable inference that can be drawn is that there was no maliciousness involved on behalf of the railroad. To the contrary, there was nothing more than a routine business procedure that was carried out concerning Tiny Smith as well as a number of other vendors, and Mr. Coggins so testified, I believe, that during the year '79, there were several before Tiny

Smith and nine or ten or a dozen after Tiny Smith that were taken off the vendor list. So even if there was a contract and if the Southern interfered with it, we say there's no maliciousness involved.

Of course, we say also that there's no evidence that can support a finding by the jury that there was any valid contract at all to interfere with in the first place. We covered those grounds in our earlier argument before Your Honor.

We say also that the only reasonable inference that can be drawn from the evidence is that the contract, if any, between Brason and Tiny Smith was a contract which was terminable at will. There is law that if a contract does not have a set duration, if it is not complete in that respect, if it is one

where one party is simply performing services and the other is paying for those services as they come, then that contract by definition is one that is terminable at will. Under the law in this state, a contract which is terminable at will, if breached, will not give rise to any damages.

Now, frankly, we cannot find any cases that deal with tortious interference with a contract that is terminable at will, but there is a lot of law on the fact that contracts between parties terminable at will, if either of the parties breaches that contract, they have no damages. We submit to Your Honor that the same rule would apply, and that if a contract between parties can be terminated, the contract terminable at will between parties can be terminated by either party without giv-

ing rise to damages, and certainly the same rule would apply to a contract that was interfered with by a third party.

Fifth, we submit that the only reasonable inference that can be drawn from the evidence is that Southern Railway had an absolute right to interfere with the contract. It had an absolute right to direct Brason to conform to the terms of the contract between Brason and Southern Railway. It was only in doing this, in exercising a right granted to it absolutely in the contract of September 8, 1978, that Southern Railway did interfere with Mr. Smith's contract, if there was a contract, and there is authority to the effect that when one exercises an absolute right of this nature, that it does not give rise to damages.

Finally, as to the cause of

action for tortious interference, we submit that the only reasonable inference which can be drawn from the evidence is that the Defendant was not motivated by actual malice in interfering with the Plaintiff's contract, if such a contract existed. The reason this is important is because of the punitive damages that the Plaintiff is seeking.

This gets into the area that is not real clear in the law, but as well as we can determine, there are two degrees of malice that may be involved in a case for tortious interference. The first is the kind of malice that is simply an act without justification or wrongful and so forth. The second kind of malice, and the kind of malice that warrants punitive damages, is the kind of malice more commonly known to the layman which is ill will, spiteful

motivation, hatred, and that sort of thing.

In order to have punitive damages for the tortious interference with a contract, the second kind of malice must be found, that is, actual malice or malice in one's heart, so to speak.

We say in the first place that there is no regular malice which is a wrongful or unjustified act on behalf of the railroad, but in the second place, there certainly is no actual malice which was an ill will or spiteful motivation against Tiny Smith. So for these reasons we think clearly that no punitive damages should be allowed on the cause for tortious interference with contractual relations, and we move to strike the demand for punitive damages insofar as it relates to that cause of action.

Turning to the cause of action in malicious prosecution----

THE COURT: Let me just hear, if it's all right with you, what the Plaintiff has got to say about that one, and let's dispose of it.

Mr. Hammer?

MR. HAMMER: Your Honor please, we submit that the evidence is sufficient to submit the issue to the jury as to whether there was a tortious interference with the contract of employment between Brason and Mr. Smith.

Your Honor recalls Mr. Smith has -- first taking the question as to whether the contract was terminable at will -- Mr. Smith testified that he was hired for the job for the duration of the job, and the testimony is clear that the job continued for about four or six months after Mr. Smith was fired. So

we have a period of six months, four to six months that the job would have lasted under the contract which Mr. Smith claims he has with Brason at the time he was fired. So we submit that's a question of fact for the jury as to whether there was a contract terminable at will.

Secondly, as to the question of malice, first of all, the directive to Mr. Bragg from the railroad official, Mr. McElyea, was "Get him off the premises. Take him off the Southern property." They made no inquiry as to what kind of work he was doing. They made no inquiry as to whether he was an employee subject to the control of the Superintendent of Brason Construction Company. They made no inquiry as to whether he was a subcontractor, and under the contract, such had to be approved. They just simply told him to

get him off the Southern property. Why? Of course, malice is a state of mind, hard to be proved by direct evidence unless somebody actually states it.

But what about the facts and circumstances in this case? The malice originated during that first interview they had with regard to the criminal prosecution when they told him, "If you do not sign this statement, you will be in jail by Christmas." The railroad officials were all present when that was stated. That's the first evidence of malice.

The second evidence of malice is even after the acquittal of the first prosecution, they continued with the second prosecution.

Third evidence of malice, they failed to disclose all of the facts with reference to the criminal prosecu-

tion, facts which were within their knowledge about the common practice of accounting, the widespread practice of accounting, and as I stated to Your Honor before, the purpose of not disclosing it was to cover up their own violations.

Moreover, the railroad, if they had any right to fire him or direct that he be fired because he was a subcontractor, if they had any, I submit they didn't, if they had any right, they waived it. The railroad employees - officials knew that he had worked on the job, they knew he had been prosecuted on two separate occasions for two separate offenses. I submit that they waived any right to discharge him.

We must bear in mind throughout this proceeding that the knowledge of an agent of the railroad, regardless that

other agents did not know at the time of the common practice, is imputable to the railroad. Any agent who has knowledge of a common practice, that knowledge is imputable to the railroad, because a corporation can only act through its agents. It does not have to act through all of its agents. Any one agent who has knowledge, that knowledge is imputable to the railroad.

Now, was there spiteful motivation? We submit that the evidence is clear, of course, no one is going to acknowledge it was spiteful. We can't cut into the skull of an individual and pull out the spite. It is only to be determined by the circumstances in this case.

We submit that on the basis of all of the circumstances in this case, there is a question of fact for the

jury: one, as to whether the contract of employment was terminable at will; two, whether there was malice; three, as to whether the railroad had an absolute right to terminate the contract; and four, whether it was motivated, the termination of the contract was motivated by malice. We submit that on the basis of all of the evidence there is a clear question of fact for the jury.

THE COURT: Anything further on that point, Mr. McMaster?

MR. HENRY McMASTER: Nothing further, Your Honor.

THE COURT: Well, gentlemen, as I recall from the testimony, Mr. Smith first saying that he had a contract to go down to Savannah and work for that job from beginning to end or whatever his terms were. I trust that you have abandoned that hourly contract bit by

now as to the $30.00 anyway, which was the rate of pay for the time during which he would be employed down there which appears to have been the testimony from Mr. Smith and Mr. Bragg and Mr. Tolley, I think that's the way you pronounce his name. But there seems to be some question from the witnesses as to how long the contract was for. Mr. Tolley said, I believe, he would have kept him on two or three months; that Mr. Smith said he would have stayed until the end of the job. Mr. Bragg said in his deposition the job would have probably lasted two or three more months, I believe is what he said, one or two, I forgot what it was, but at least it would have lasted six more days because he had to hire somebody else to come out there and do some of that work for six days, so there certainly was an implied contract from

the evidence, regardless of how you look at it, that he had a job there until he finished whatever work would have been necessary for him and his machine to perform.

So then we move on to the justification issue as to whether they had a right to terminate him. Now, Mr. Bragg testified that the railroad Project Engineer was on there almost daily, and that he was down there at least once a week, sometimes two or three times a week, and he was confident that Mr. Smith had met the Project Engineer, and that they knew he was there working, I gather because of the uniqueness of that machine that Mr. Smith owned. So I think it's a question for the jury as to whether the railroad waived the right, if they had a right, to terminate it.

As I have mentioned earlier,

that contract only goes to the point of approving subcontracts when they are entered into, and I don't know as of now, I still have at least some questions as to whether that was the subcontract or employment or what. It would appear that that would be another jury question in and of itself because of the uniqueness of the situation.

Now, as to the malice as it goes to the elements of the cause of action as well as to punitive damages, certainly I could see how reasonable men could think that there was malice involved, it being the testimony of those gentlemen from Atlanta, I forget his name, McElyea or something of that nature, that somebody called them or at least they were advised that he was on that job and they told him, "Get him off." They didn't investigate what he was doing, wasn't

doing or anything. They said, "Get him off." So evidently there wasn't much question in the railroad's mind that if he was on their job and that he had been involved with these other activities as to those prior criminal cases, they were not going to tolerate him being on railroad property, so they put him off. I believe the testimony was they called late one afternoon and they had him gone by the next morning. So I think it's for the jury, so I would overrule your Motion as to the tortious interference with a contractual relationship and as to the punitive damages.

Now, I'll hear you on the malicious prosecution.

MR. HAMMER: Your Honor please, we also have a Motion, I don't know which you want to take first, on those two causes of action.

THE COURT: Let him finish his. I guess we should have taken yours first, but being we started with him, we'll let him go.

Mr. McMaster, we'll go with the malicious prosecution.

MR. HENRY McMASTER: Your Honor, the Defendant moves for a directed verdict as to the two cause of action in malicious prosecution for the following reasons:

First is that the only reasonable inference which can be drawn from the evidence is that the Defendant had probable cause to believe that the Plaintiff had committed the crimes for which he was later charged and tried; second, the only reasonable inference which can be drawn from the evidence is that the Defendant was not motivated by malice in the prosecution of the Plaintiff; third,

the only reasonable inference which can be drawn from the evidence is that there was no misrepresentation, fraud or concealment of material facts known to the Defendant at the time by the Defendant in its relations with the prosecuting authorities, and such misrepresentation being an essential requirement in a malicious prosecution action in which a Grand Jury returned a True Bill.

This gets us back to what we argued before on the Motion on Non-Suit, and that is in a situation where a Grand Jury has taken action and has found probable cause, the only way that a Plaintiff can maintain an action for malicious prosecution is to show that material facts were misrepresented or fraudulent or there was fraud involved in the representation of the fact to the prosecuting authorities. Now, on

that point, the Plaintiff takes the position that the material fact that was not told to the prosecuting authorities was that "job swapping" was a widespread common practice. We submit to Your Honor that that is not a fact. That is merely a contention that "job swapping" was a widespread common practice. In order for the Plaintiff to recover for malicious prosecution, he must show that a fact was misrepresented. They say that "job swapping" was a widespread common practice, and they submit that as a fact. We say that is not a fact. That is only a contention and for that reason, their cause of action should fall.

But furthermore, even assuming that the widespread common practice of "job swapping" is a fact, assuming that for the purposes of this argument,

there is absolutely no proof, no evidence from which a reasonable inference can be drawn that anyone on behalf of the railroad misrepresented that fact, if we assume it exists, to the prosecuting authorities.

The Plaintiff has produced no evidence to show any actual misrepresentation. All they have done is they have said that this common practice was a fact and that it should have been told to the prosecuting authorities. But we submit that in an action for malicious prosecution which the South Carolina law books themselves say is a cause of action frowned upon by the Courts, because it deters citizens from going to the authorities and reporting what they believe to be crimes, that what the Plaintiff has offered as a misrepresentation does not meet the standard that

is demanded by the South Carolina Courts.

In fact, we submit that the only reasonable inference which can be drawn from the evidence is that a complete and full disclosure was made to the prosecuting authorities. Keeping in mind that when Mr. Edwards was interviewed, he mentioned his budget problems, didn't use the word "job swapping", of course, but he spoke of budget problems. Mr. Gary Kay was there, and Mr. Kay included that in his December the 2nd report to the District Attorney. That fact was disclosed to Mr. Kay, he knew about it, included it in his report, and Mr. Kay testified that the first time that he heard any contention that "job swapping" was a widespread and common practice was at the January the 12th conference among the lawyers and all the Defendants.

Now, after Mr. Kay heard those

words, what did he do? He investigated further. Nothing was concealed from him. There was no representation made to him, there is not the slightest bit of evidence that anyone ever told Gary Kay or Eric Ruschky that "job swapping" does not exist on the Southern Railroad.

THE COURT: They didn't tell him that it did either, did they?

MR. HENRY McMASTER: No, sir, they didn't tell him that it did. They told him about the budget problems though, because they told him at Mr. Edwards' interview. Mr. Edwards himself told him about it, but the reason they didn't tell him that "job swapping" was a common widespread practice was because it was not a common widespread practice.

THE COURT: Now about that Plaintiff's Exhibit that was put in through--anyway concerning that letter

that went out to all the Division Engineers throughout the whole----

MR. HENRY McMASTER: This is Mr. Hartranft's letter that went in through Mr. Russell.

THE COURT: Mr. Hartranft's letter.

MR. HENRY McMASTER: That letter, like a number of other things dealing with corporate honesty, was designed to stop unauthorized practices and was merely a restatement of policy and was not a recognition that "job swapping" was a widespread and common practice.

THE COURT: Well, of course, the evidence from which the jury could draw a reasonable inference, I forgot how many witnesses have been put up there now that have testified, almost all of them either Southern Railway employees or former employees, said that it did

exist, and in fact, that gentlemen down there in Georgia that Mr. Ruschky and Mr. Kay went to see after the Indictment, he testified in fact he did it himself. He said he did it to a lesser degree.

MR. HENRY McMASTER: Five hundred dollars worth.

THE COURT: So we leave that for the jury as another one of those little incidences that people working for the railroad knowing that they are in a problem have to be a little more cautious about what they might say or not say, and unfortunately at least the way I see it, it became impossible because of the very system of the "job swapping" to find out what work had been charged to which invoice, because there's no way to tell how they transpired.

I think that the major situation, number one, for the jury to make a de-

termination about as to you mentioned facts in regard to the contention would be in fact if it was widespread. As Mr. Hammer said in his earlier argument about the contractual matter that if certain ones at least in, and it becomes a point of degree, agents of the railroad are aware that "job swapping" is going on, and they themselves are actually participating in "job swapping" then, of course, these officials want to hide it from their own police, who I think that, and I might as well say this now, based on Mr. Ruschky's testimony, you know, there is not much question about the fact that the Railroad Police were prosecuting this action right along with him, at least I have come to that understanding based on his testimony, and in addition, for once the Plaintiff sat down without going on down the road, they asked him

if in fact he would have known about this prior to the Indictment, would he have gone for further investigation prior to the Indictment, and he said, "yes."

So I think it's just a factual issue as to whether they willfully, knowingly, and all these other things withheld that information, knowing that if they told the U. S. Attorney at it was prevalent, he might say, "I'm not getting bogged down in that."

It is one thing to go around prosecuting your own employees for dishonest acts, but if in fact there were as he contends and as the jury found that he was an innocent fellow caught up in the web, is I think his words, caught in the middle, I think he said, or between or something, that those are issues for the jury. I don't know what Mr. Hammer has got in mind with his Motion, but I

think it's a factual issue based on all of the evidence that's here. Of course, I'll hear you further. I just mention those matters as to whether there was an intentional withholding of that information now, just like our problem with Defendant's Exhibit No. 33.

MR. HENRY McMASTER: Next then, Your Honor, is we submit that the only reasonable inference that can be drawn from the evidence is that in the cause of action involving the five-ton air conditioning unit, that all the material facts were presented by the Defendant to the prosecuting authorities.

The point is that even assuming that "job swapping" was a widespread and common practice, and assuming that that fact, that it was a fact, and that that was misrepresented to the prosecuting authorities, that piece of information

has nothing to do with the prosecution of the five-ton air conditioning unit matter. Tiny Smith himself said that there was no "job swapping" involved in the five-ton air conditioner.

THE COURT: I will agree there was no "job swapping" involved in the five-ton air conditioner. It was plain and straight to the point that he sent them a bill for the air conditioning unit. I would agree with that.

MR. HENRY McMASTER: In that relation, then we say that there is no evidence of any sort of misrepresentation or withholding of a material fact to the prosecuting authorities concerning the five-ton air conditioning unit, and without such, the matter having gone before the Grand Jury, there's no cause of action for malicious prosecution.

THE COURT: Mr. Thornburg tes-

tified in going to the invoices, he noticed an excavating company doing air conditioning work. Mr. Kay said that they all thought it was highly unusual that an excavating company would be billing for an air conditioning unit. Now, there's further testimony to the fact this wasn't the first time Mr. Smith had billed the railroad for an air conditioning unit, and it wasn't the first time that he had bought materials and had them for the benefit of the railroad and sent them a bill for it. They talked about the ballast for one thing I recall, and they said it may be more than one time that he went out as a favor to the railroad because the railroad would not furnish cars for their own employees as long as they could rent them, sell them, whatever they called the term for using somebody's, they

haul traffic for some other shipper, that they got him to haul ballast for them that he had never seen or heard of, and he sent them a bill for the ballast, and they paid him for it. So there again if they would have looked into it, the Railroad Police, they would have found out that that, too, was a common practice.

In fact, there was testimony here from that gentleman that works over there in Tennessee or somewhere I forget where he is, they move them around so much, but he said that he had to pour concrete, I believe it might have even been the same Andrews Yard in Columbia, and that the railroad was just opposed to anybody ever buying concrete in the budget, they just didn't tolerate it, but he had Mr. Smith, I believe, he might have even charged that one to a

derailment, but he at least went out and purchased the concrete for them. I guess they didn't want concrete, I don't recall what he said. Anyway there was widespread use, I know, about the ballast that he said he built them with carriers' costs on that, he said probably on more than one occasion.

Anyway as to that, there's some evidence that a reasonable man could determine that the railroad in reality--based on I guess what Mr. Hammer said when Mr. Smith refused to sign a document like Mr. Harper did because he said that he had not done any of those things, he didn't have to buy a job, and he was going to let it go, and if the jury wants to believe that it so infuriated the railroad, and their people, that if you believe them, they threatened him at that time if he didn't,

they would put him in jail, and then they just continued on that process, if the jury wants to believe that. What else?

MR. HENRY McMASTER: I have a couple more points, Your Honor.

We will address this a little bit, but we submit the only reasonable inference which can be drawn from the evidence is that the Defendant was not motivated by action malice in the prosecution of the Plaintiff, and in the absence of actual malice as opposed to some malice which may be implied, there can be no award of punitive damages.

Here again we get into the two types of malice, and one is just an unjustified wrongful act, and that is the type of malice that can support malicious prosecution, but the second kind of malice is the actual malice which is ill will and hatred and so forth toward the

Plaintiff, and we submit that there has been no showing at all of any sort of actual malice on behalf of the railroad.

We submit that the only reasonable inference which can be drawn from the evidence is that the Plaintiff has failed to rebut the presumption of probable cause, which presumption was raised by the True Bills returned by the Grand Jury.

Furthermore, on the point of malice, there is some authority to the effect that malice in the mind of an agent of the railroad or any other organization may not be automatically presumed to exist on behalf of the organization itself. Now, there has been absolutely no evidence to show that there was any malice on behalf of the corporate officers of the railroad. If there has been any showing of malice at

all, we submit that the only malice that could be implied or inferred would be malice on behalf of the Southern Railway officers. But in a malicious prosecution matter where malice on behalf of the Defendant is the critical question, that is the case before us, we submit that it must be proven that the Defendant had the malice and not merely its investigating officers. It cannot be implied or imputed to the principle. There has been absolutely nothing to show that the corporate entity of the Southern Railroad had any malice at all toward the Plaintiff.

Those are all of our grounds.

THE COURT: All right, Mr. Hammer.

MR. HAMMER: Your Honor, if it pleases, the Plaintiff moves for a directed verdict as to the first two

counts in favor of the Plaintiff as to the issue of liability on the grounds that the only reasonable conclusion which can be drawn from the totality of the evidence is that the Defendant, one, instigated the criminal prosecution; two, without probable cause and with malice, this by reason of the fact that the railroad acting through its agents excited a belief in the mind of the Postal Inspector and the Assistant U.S. Attorney, Mr. Ruschky, that the Plaintiff was guilty of a crime in each of the prosecutions by turning over to the Postal Inspector and the U. S. Attorney certain information from which the Postal Inspector and the U.S. Attorney had a right to believe that there was probable cause. Failing, however, to disclose to the Federal authorities the accounting procedures, the wide-

spread accounting procedure employed by the railroad, for whatever purpose it may have

EXCERPT FROM MOTION FOR JUDGMENT N.O.V. AND NEW TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 79-965

TINY SMITH, Plaintiff, vs. SOUTHERN RAILWAY COMPANY, Defendant.	DEFENDANT'S MOTION FOR JUDGMENT N.O.V. AND NEW TRIAL

JUDGMENT NOTWITHSTANDING THE VERDICT

The Defendant Southern Railway Company moves for Judgment Notwithstanding the Verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure upon the following grounds:

AS TO THE CAUSES OF ACTION FOR MALICIOUS PROSECUTION

* * * * * * *

7. "That the only reasonable inference which can be drawn from the

evidence is that no material fact existed which the Defendant failed to disclose to the prosecuting authorities, to wit, the Plaintiff has failed to prove that "job swapping" ever existed as a common practice on the railroad; if such a practice were not a fact, there was no opportunity for the Defendant to disclose it to anyone."

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1260

TINY SMITH — Appellee

v.

SOUTHERN RAILWAY COMPANY — Appellant

Filed
Oct 22 1982
U.S. Court of
Appeals
Fourth Circuit

O R D E R

We have considered the appellee's petition for rehearing in this case and are opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Hall and Judge Phillips.

s/ H. E. Widener, Jr.
For the Court

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 81-1260

Entered
11-8-82 mlp

Tiny Smith, Appellee,

v.

Southern Railway Company, Appellant

Appeal from the United States District Court for the ----- District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the ----- District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause,

be, and the same is hereby, reversed.

s/ William K. Slate, II
CLERK